

## Exploring the new regime for appeals against Ofcom decisions

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**TMT analysis: What impact will section 87 of the Digital Economy Act 2017 (DEA 2017) have on the Competition Appeal Tribunal's (CAT) review of Ofcom decisions?** Paul Stone, partner at Charles Russell Speechlys, predicts it may be some time before there is a settled position on the scope and intensity of review to be applied by the CAT.

### What are the practical differences that DEA 2017, s 87 will bring to the CAT's review of Ofcom decisions?

Under the previous regime, where a party appealed against most Ofcom decisions, the CAT assessed the appeal on a full merits basis. This means that the CAT was able to consider a wide range of issues on appeal, including alleged factual and other errors, and to take account of new evidence, where the CAT considered that appropriate. In addition, the CAT was able to require Ofcom to re-take its decision. In practice, the full merits review regime allowed for quite an extensive consideration of Ofcom's original decision and essentially meant that the CAT asked itself whether Ofcom's decision was wrong.

[DEA 2017, s 87](#) means that, for all appeals against Ofcom decisions made from 31 July 2017 onwards, the CAT will apply the same principles as would be applied by a court on an application for judicial review. Although the grounds for judicial review are flexible and have evolved over time, they are generally considered to be narrower in scope than the grounds of appeal under a full merits review.

For practical purposes, it is usually possible to group the grounds for judicial review under three main headings:

- illegality (ie, did the decision maker make an error of law)
- irrationality (was the decision unreasonable)
- unfairness (has the decision maker failed to follow a proper and fair process in reaching its decision)

Depending on the case, a court may decide to apply a lighter or more intensive review of the decision being challenged.

### What tips are there for practitioners who are preparing appeals under the new regime?

Practitioners will wish to consider carefully the grounds of appeal that are being put forward for appealing a decision. There is likely to be debate about the extent to which certain grounds qualify as judicial review grounds—and therefore, practitioners will need to be alive to this and seek to pre-empt, as far as possible, subsequent admissibility challenges.

### What is the likely impact—for instance, will it make it harder to appeal, and are we likely to see a decrease in the number of decisions which are appealed?

As noted above, cases are more likely to involve debate about the extent to which certain grounds of challenge qualify for review by the CAT. It is possible, therefore, that there will be satellite procedural disputes early on in cases, which may slow down their progress. At this stage, it is difficult to predict what the impact will be on the number of appeals—and whether parties will consider it harder to appeal and therefore be dissuaded from doing so.

In practice, early appeals brought under the new review standard are likely to involve consideration of the approach which the CAT should adopt. The CAT already applies the judicial review standard in other areas of its work, notably appeals against market and merger decisions of the Competition and Markets Authority. It will be interesting therefore to see how the CAT applies its case law in those areas to appeals against decisions by Ofcom. It is also possible that we will see appeals to the Court of Appeal and the Supreme Court on the standard of review to be applied—and so it may be some time before there is a settled position on the scope and intensity of review to be applied by the CAT.

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